In the Supreme Court

OF THE

United States

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CHARLES ELMORE CROPLEY

OCTOBER TERM, 1941

No. 762

314-700

JAMES M. LEAVER, JR.,

Petitioner,

vs.

CITIZENS NATIONAL TRUST AND SAVINGS BANK OF RIVERSIDE (a national banking corporation), and DONALD PARKER, as Administrators with the Will Annexed of the Estate of George D. Parker, Deceased, FOOD MACHINERY CORPORATION (a corporation), SIGNODE STEEL STRAPPING COMPANY (a corporation), PARKER MACHINE WORKS, INC. (a corporation), JOHN D. CRUMMEY and WIRE TIE MACHINERY COMPANY (a corporation),

Respondents.

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT THEREOF.

CHARLES E. RIORDAN,
C. RUSSELL RIORDAN,
National Press Building, Washington, D. C.,
Attorneys for Petitioner.

BOOTH B. GOODMAN,
Latham Square Building, Oakland, California,
Of Counsel.

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Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:

Your petitioner, James M. Leaver, Jr., respectfully prays that a writ of certiorari issue to review the decision of the Circuit Court of Appeals of the Ninth Circuit rendered in the above cause on July 17, 1941 in which decision, the Court modified a decision of the District Court so as to dismiss the action for want of jurisdiction. A transcript of the record in the case including the proceedings in said Circuit Court of Appeals, is furnished herewith in accordance with the rules of this Court.

SUMMARY STATEMENT OF MATTERS INVOLVED.

The controlling issue involved in the first cause of action is whether the intent and effect of the acts of the respondents constitute a restraint of commerce in violation of the act of July 2, 1890, c. 647, 26 Stat. 209, 15 U. S. C. A. (popularly known as the Sherman Act), as amended by the act of 1914, c. 323, 38 Stat. 731, 16 U. S. C. A. Respondents, Signode Steel Strapping Company will hereinafter be referred to as "Signode"; Donald Parker and Citizens National Bank of Riverside as "Parker's Administrators"; Food Machinery Corporation as "Food Machinery"; Wire Tie Machinery Company as "Wire Tie".

To avoid confusion, the names "Parker Leaver-Evans Wire Binding Machinery Project" and "Parker-Leaver Evans Wire Tie" referred to in the

record as the "Project" have no legal identity. (R. 6.)

The complaint as amended pleads, and the answers, affidavits, admissions and interrogatories support the following facts: The wire binding machine and *unpatented* repair and replacement parts business by the parties to this action is a nation-wide business (R. 27); that Leaver was extensively engaged in that business for more than nine years without interference. (R. 11, 22-24.) Signode and Wire Tie are engaged in the same business on a national scale and control more than 95% of the automatic wire binding machinery business in the whole of the territory in the states comprising the United States of America; 100% in connection with the newspaper trade throughout the whole of the United States and 100% in states and territory lying east of the Rocky Mountains. (R. 249, 250, 743, 748, 1194-1205.)

The automatic wire binding machine business involved in this case was originally developed and carried on by Leaver, George D. Parker and Charles E. Evans, coadventurers in that business under an operating, selling and price-fixing method and agreement for all United States territory (R. 9, 54-72), referred to as the 1922 agreement. Leaver, Parker and Evans jointly invested in the development of that business in excess of a sum of $150,000.00, and Leaver's share in that investment was 40% thereof. (R. 25.) Four types of "Standardized" machines designated "BW", "EW", "HW", and "KW" types were manufactured and sold and a large and profitable business established. (R. 11, 23, 25.)

Leaver, Parker and Evans at all times operated severally and competitively in the sale thereof in the ordinary channels of trade. (R. 11, 60, 66.) Parker acted as trustee and in a fiduciary capacity (R. 12) and carried on manufacture at Riverside, California, in their joint interests and shipped interstate. (R. 11.) They jointly owned and maintained stocks of "Standardized" machines and parts in Washington, New York and Illinois, the territory of Hawaii, and England, for sale through their representatives located in those states and places. (R. 27.) Parker died August 24, 1930. (R. 3.) Leaver, Evans and Parker's heirs, "Owners", continued to carry on the business (R. 70, 71) under the 1922 agreement and two modifying agreements. (R. 74-83, 83-91.) An "Owners Committee" took over, managed and conducted the business for them (R. 15-17), but not in certain interstate territory individually reserved by them. (R. 77, 78.) Leaver, Parker's heirs, Evans (Evans died December 24, 1934 (R. 4)), and Evans' heir, Minnie Amanda Evans, operated severally and independently in that certain interstate commerce territory. (R. 22, 23, 77.) More than 95% of all the sales and shipments made by them were interstate. (R. 27, 77.) Leaver's sales profit over a period of nine years prior to July 14, 1936 did average $5844.94 per year (R. 41) and his manufacturer's profit for a period of five years immediately preceding that date did average $11,057.96 per year. (R. 41.)

Parker Machine Works, Inc., a corporation organized by Parker's heirs, manufactured for and on behalf of Leaver and Evans under orders of the

"Owners Committee" under a written agreement which, upon notice, expired July 14, 1936. (R. 83-91.) Time was requested to complete unfinished business and was granted. (R. 18.) The special manufacturing facilities were in possession of that corporation. (R. 92-139.) Prior to that date of expiration the "Owners Committee" by resolutions, concurred in by Minnie Amanda Evans, established the place of business of the Leaver-Parker-Evans Wire Tie at 5844 Birch Court, Oakland, and authorized Leaver to demand and take over and remain custodian of all records and assets of the "Owners" including those manufacturing facilities, for a period of four years, or until otherwise decreed by order of Court. (R. 837.) Leaver made these demands upon L. O. Campbell, auditor, Parker Machine Works, Inc., and Parker's administrators prior to July 14, 1936. They refused such demands. (R. 20.)

Signode was engaged in selling and/or distributing "Standardized" machines and parts in interstate commerce under a license and extension thereof, which expired July 14, 1936. (R. 769.) Signode again requested an extension of that license, which Leaver refused.

Signode unlawfully leased those machines under contracts containing "tying clauses" requiring the lessee to purchase exclusively from Signode unpatented repair and replacement parts, and common commodity wire supply, used by said machines, at a premium above existing market prices. (R. 7, 784-802.) Food Machinery then desired to make arrangements with Leaver and he refused. (R. 251.)

On July 7, 1936, Signode and Food Machinery Company surreptitiously entered into a written contract (R. 297) which contract provided for organization of Wire Tie (formerly Nailer Machinery Company) for the sole purpose of purchasing with money and assets of Food Machinery Company, the assets of the estate of George D. Parker, deceased, expressly including *non-assignable* and *non-transferable* licenses, rights, interests and agencies. (R. 298-308.) By that contract, dated July 7, 1936 (R. 297), Signode acquired all of the stock of the Parker Machine Works, Inc., which had in its possession said special manufacturing facilities and Signode also acquired control of Nailer Machinery Company, now Wire Tie, through the medium of placing its capital stock in the name of an attorney to be named by Signode. (R. 1254, 1288.) On August 30, 1936, Leaver, Parker's heirs and Minnie Amanda Evans had available for sale to prospective purchasers, in the ordinary channels of interstate trade, at reasonable established market prices, valuable stocks of machines and parts located at Oakland and Riverside, California, in Washington, New York, Illinois and in Hawaii and England. (R. 257-259.) On September 9, 1936, Signode secured under the agreement of July 7, 1936, and by a "Bill of Sale" from Wire Tie, that entire stock. (R. 257-259.) On October 14, 1936, Minnie Amanda Evans, upon the written indemnity guarantee of Signode, entered into a written contract with Parker Machine Works, Inc. (R. 322), the wholly owned subsidiary of Signode. By that agreement, Minnie Amanda Evans contracted to refuse to permit any person other than Parker

Machine Works, Inc., to use the special manufacturing facilities unlawfully withheld by respondents for the purpose of shutting off Leaver's supply, sale and manufacture. (R. 154.)

Since August, 1936, Leaver has been wholly prevented and excluded from doing business in sale, production and distribution of automatic wire binding machines and *unpatented* repair and replacement parts by respondents' acts and has been greatly damaged. (R. 146-157.)

Infringement.

The controlling issue involved in this action is whether the acts of respondents infringe upon Leaver's letters patent and violate the patent laws of the United States. This cause of action was instituted by Leaver under the patent laws against respondents Signode, Wire, Tie, Parker Machine Works, Inc., Parkers' administrators, and John W. Crummey. This action for treble damages and injunctive relief under the patent law pleads:

Respondents since issue of Leaver's several letters patent, September 15, 1936, and prior to filing the complaint, without license and consent of Leaver, but contrary thereto, sold for use and/or licensed for use, certain wire binding machines embodying inventions disclosed and claimed in Leaver's letters patent. Leaver notified respondents to desist from infringement but respondents failed and refused to comply with that request or any part thereof. Defendants conspired together to infringe upon said patent rights (R. 46-50) and continued to infringe said letters

patent. (R. 49.) Leaver has suffered damages by reason of the infringement aforesaid. (R. 44, 49.) The prayer of the complaint is for injunctive relief, damages in the sum of $50,000.00, and that said damages be trebled. (R. 52, 53.)

JURISDICTION AND PROCEDURAL STEPS.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. (43 Stat. 938, 28 U. S. C. A. Sec. 347 (a).)

The complaint was filed on September 20, 1938, and was amended on July 14, 1939. Appellees answered the amended complaint and moved with supporting affidavits for a summary judgment in their favor. Appellant filed and served opposing affidavits. The motion was heard and granted, and judgment for appellees was accordingly entered. Appeal to the Circuit Court of Appeals of the Ninth Circuit followed. The Circuit Court of Appeals of its own volition held that the District Court was without jurisdiction, and refused to pass upon any assigned error. In the opinion filed, the Circuit Court of Appeals treats the case as though there were but one cause of action. Petition for rehearing filed in the Circuit Court of Appeals, was denied on the 27th day of August, 1941. The date of the judgment of the Circuit Court of Appeals for the Ninth Circuit herein sought to be reviewed is July 17, 1941.

QUESTIONS PRESENTED.

1. Did not the Circuit Court of Appeals for the Ninth Circuit err in holding that the U. S. District Court is without jurisdiction to inquire into the legality of a conspiracy and acts which have wholly eliminated the party seeking relief from continuing in his established business in interstate commerce, and creating a monopoly in his competitor?

2. Did not the Circuit Court of Appeals for the Ninth Circuit err in holding in effect that the interpretation of a contract incidentally involved in a suit under the anti-trust laws deprives the U. S. District Court of jurisdiction, even where the restraint of interstate commerce is admitted, the damage established and the contract itself is pertinent to show the measure of damages and the illegality of the acts of the conspirators?

3. Did not the Circuit Court of Appeals err in holding that the second cause of action in the complaint for infringement, and in which no violation of a contract is pleaded by petitioner and no relief prayed for thereunder, is an action ex-contractu and not an action in tort under the patent laws of the United States?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

The following are the special and important reasons addressed to the sound discretion of this Honorable Court, and relied on for allowance of a writ of certiorari:

(1) The decision of the Circuit Court herein establishes for the first time that a combination in restraint of trade can contract against liability under the anti-trust laws.

(2) The anti-trust decisions of this Court supports the rule that no one can be exempted from the application of the anti-trust laws. There is no justification for dismissal of an action filed under the anti-trust laws because it sets up a contract necessary to establish damages and the erroneous construction by respondents in violation of the anti-trust laws. By making such a distinction the Circuit Court brought the anti-trust laws in hopeless conflict with the law as established by this Court. The anti-trust law should prevail. At a time when a valuable industry is threatened and anti-trust laws violated, the public is entitled to clarity in the law, not conflict, injury and confusion.

(3) The decision of the Circuit Court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision in the following:

There is no justification for the statement of the Circuit Court herein:

> "We therefore regard as frivolous appellant's characterization of his adversaries' acts as patent infringements and violations of the Anti-Trust Laws."

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court directed to the United States Circuit Court of

Appeals for the Ninth Circuit commanding that Court to certify and send to this Court on a day to be designated a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals had in these causes, to the end that the same may be reviewed and determined by this Court; that the judgment of said Circuit Court of Appeals be reversed as both causes of action and that your petitioner be granted such other and further relief as may seem just and proper.

Dated, Washington, D. C.,
November 24, 1941.

Respectfully submitted,
CHARLES E. RIORDAN,
C. RUSSELL RIORDAN,
Attorneys for Petitioner.

BOOTH B. GOODMAN,
Of Counsel.

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BRIEF IN SUPPORT OF
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OPINION AND JUDGMENTS BELOW.

The opinion and judgment of the Circuit Court of Appeals for the Ninth Circuit which modifies the judgment of the District Court against Leaver and dismisses the action for want of jurisdiction will be found in the record at pages 1572-1575; and the summary judgment of the District Court against Leaver is found in the record at page 1486.

For the sake of brevity we refer to the preceding petition for the following:

Jurisdiction.....(supra, page 8); and

Statement of the Case.....(supra, pages 2 to 8).

ASSIGNMENT OF ERRORS.

The Court erred in holding that it did not have jurisdiction of the first cause of action under the antitrust laws.

The Court erred in wholly failing to pass upon the second cause of action for infringement as distinguished from the first cause of action under the antitrust laws.

The Court erred in holding that the Court did not have jurisdiction of the second cause of action under the patent laws.

The Court erred in holding that the pleadings and affidavits showed that the action did not arise under the patent laws or the antitrust laws and did not really and substantially involve any dispute or controversy properly within the jurisdiction of the District Court.

The Court erred in dismissing each cause of action for want of jurisdiction.

The Court erred in not holding that the intent and effect of respondents' unlawful retention of the special manufacturing facilities was to shut off production and distribution of wire binding machines and parts and cripple and destroy the ability of petitioner to obtain and execute contracts involving interstate commerce and create a monopoly.

The Court erred in not holding that the intent and effect of respondents Signode's and Wire Tie's unlawful seizure of all existing machines and parts was to shut off supply and cripple and destroy the ability of petitioner to sell and supply wire binding machines and parts in interstate commerce.

The Circuit Court erred in not following the decisions of this Honorable Court in interpreting and applying the provisions of the Sherman Act.

ARGUMENT.

1. THE COURT OF APPEALS ERRED IN HOLDING THAT THE PLEADINGS AND AFFIDAVITS SHOWED THAT THE ACTION DID NOT ARISE UNDER THE PATENT LAWS OR THE ANTI-TRUST LAWS AND DID NOT REALLY AND SUBSTANTIALLY INVOLVE ANY DISPUTE OR CONTROVERSY WITHIN THE JURISDICTION OF THE DISTRICT COURT.

In dismissing the action and modifying the judgment entered by the District Court the Circuit Court of Appeals stated (R. 1572-1575):

> "The pleadings and affidavits showed that the action did not arise under the patent laws or the antitrust laws and did not really and substantially involve any dispute or controversy properly

within the jurisdiction of the District Court. Therefore, instead of entering judgment on the merits, the court should have dismissed the action for want of jurisdiction. Judicial Code, §37 (28 U. S. C. A. §80)."

"The action arose upon and involved the construction and interpretation of a contract which, among other things, granted a license for the manufacture and sale of machines embodying inventions for which patents had been issued or applied for. That, however, did not make it an action arising under the patent laws."

"The only controversy which this action really and substantially involved was a controversy as to who were Parker's and Evans' successors in interest. The gravamen of the complaint was that appellees and their codefendants had claimed and were claiming to be such successors and had exercised and were exercising rights which the contract had vested in Parker and Evans; whereas, according to the complaint, appellant had succeeded to and was entitled to exercise all of said rights."

Interstate commerce.

It can hardly be said that the allegations that the respondents entered into a conspiracy to restrain the competition of the petitioner in trade and commerce among the several states, and to deprive him of his business and to obtain that business for the respondents, do not charge with substantial certainty an intent to restrain commerce and the full and free flow of interstate competition. See *Addyston Pipe Co. v. United States,* 175 U. S. 211, 241, 242, 20 S. Ct. 96, 44 L. Ed. 136.

The quoted holding of the Circuit Court is in error for six reasons.

* * * * * * *

The pertinent provisions of the Sherman Anti-Trust Act involved are as follows:

> "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, c. 647, Sec. 1, 26 Stat. 209.)
>
> Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, c. 647, Sec. 2, 26 Stat. 209.)
>
> Section 7. Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount

in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (Oct. 15, 1914, c. 323, Sec. 4, 38 Stat. 731.)"

The pertinent provisions of the Clayton Act involved are as follows:

"Section 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. (U. S. C. A., Title 15, Sec. 14.)

Section 7. No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or

tend to create a monopoly of any line of commerce. (U. S. C. A., Title 15, Sec. 18.)

Section 16. Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this chapter, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: * * *."

The first is that the Court failed to give effect to Section 1 of the Sherman Act. Under Section 1 the conspiracy and resulting restraint upon interstate commerce is sufficient. The complaint, as amended, pleads, and the evidence as may be deduced from the answers, affidavits, admissions, and interrogatories support the pleadings. The rule is succinctly stated:

> "If, by necessary operation of the conspiracy there is an actual restraint the statute is violated, the actual intent being immaterial."
>
> *Standard Sanitary Mfg. Co. v. United States,* 226 U.S. 20, 49;
>
> *Paramount Famous Corp. v. United States,* 282 U.S. 30, 49.

Admittedly (R. 35, 37, 38, 42, 146-156) the complaint, as amended pleads a violation of Section 1 by

conspiracy to restrict national automatic wire binding machine and parts business in its broadest sense and in all of its aspects, involving generally the flow of commerce between parties residing in different states, and particularly in movements of such machinery.

The fact is,—the gravamen of Leaver's charge in the first cause of action is that the scheme in this case amounted to a vicious conspiracy to circumvent the Sherman Act by basing it upon a license of slight or no importance which was used only as a subterfuge.

The record clearly evidences that Signode (R. 291, 292, 279), Parker Machine Works, Inc. (R. 429), Food Machinery (R. 477), and Wire Tie (R. 218), collectively allege "exclusive sales rights" in interstate commerce which transcend any patent monopoly.

Wire Tie states (R. 218):

> "This defendant as the successor in interest of the exclusive sales rights for wire tying machines *and parts.*"

Signode states (R. 280):

> "George D. Parker owned the exclusive right to manufacture machines *and parts* under said contract."

The commerce here involved in *unpatented* repair and replacement parts is very substantial as the record shows. (R. 743-748.) All items showing "less 20%" being Signode's discriminatory discount. (R. 1199.)

Beyond any peradventure the *unpatented* repair and replacement parts constitute a substantial part of the monopoly exercised by the respondents' corporations.

In *Carbice Corporation v. American Patents Corporation,* 51 S. Ct. 334, 283 U. S. 27, the Court stated:

> "The limited monopoly to make, use and vend an article may not be 'expanded by limitations as to materials and supplies necessary to the operation of it'. *Motion Picture Patents Co. v. Universal Film Mfg. Co.,* 243 U. S. 502, 515. Compare *United Shoe Machinery Corp. v. United States,* 258 U. S. 451, 462; *United States v. General Electric Co.,* 272 U. S. 476, 492." (at page 31.)

In the instant case all the respondents support Wire Tie, in asserting *"exclusive sales rights for both machines and non-patented parts"*, a practice which this Court has repeatedly condemned. The patents under the 1922 agreement are not for parts and parts are not referred to in any manner whatsoever in said agreement.

The unpatented supplies and parts monopolized by respondents are merely used in the operation of the machines.

In *Standard Sanitary Mfg. v. United States,* 226 U. S. 20 at pages 33 and 34, the Court said:

> "Control over the supply of such unpatented material is beyond the scope of the patentee's monopoly; and this limitation, inherent in the patent grant, is not dependent upon the peculiar function or character of the unpatented material or on the way in which it issued. Relief is denied because the Dry Ice Corporation is attempting, without sanction of law, to employ the patent to secure a limited monopoly of unpatented material used in applying the invention. The present attempt is analogous to the use of a patent as an

instrument for restraining commerce which was condemned, under the Sherman Anti-Trust Law."

Patent monopoly.

In evidence of the world-wide scope of the monopoly attempted and exercised by respondents, the following patents are claimed by Wire Tie Machinery Company to have been purchased from the estate of George D. Parker, deceased:

Foreign Patents—13 (R. 975);
U. S. Patents—7 (R. 975);
U. S. Patent Application—1 (R. 977).

In *Standard Oil v. U. S.*, 283 U. S. 163, at page 174, the Supreme Court stated:

> "The lawful individual monopolies granted by the patent statutes cannot be unitedly exercised to restrain competition. *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20; *United States v. New Departure Mfg. Co.*, 204 Fed. 107; *United States v. Motion Picture Patents Co.*, 225 Fed. 800, appeal dismissed, 247 U. S. 524. Compare *United States v. Kellogg Toasted Corn Flakes Co.*, 222 Fed. 725; *United States v. Eastman Kodak Co.*, 226 Fed. 62, appeal dismissed, 255 U. S. 578."

The Dun and Eldridge applications (now issued patents) under which Signode has for years repeatedly threatened to destroy the business of petitioner (R. 29, 250, 251, 688-695, 703-714) are the only other United States patents in existence relating to the type of Automatic Wire Binding Machines involved in this action, Signode owning and controlling the exclusive right to manufacture and sell the same for the entire

newspaper trade throughout the United States and to all users and trade in all the States which lie east of the Rocky Mountains.

Infringement.

The pleadings of the infringement cause of action allege no violation of the contract by reference alleged therein and asks no judgment upon that contract. The only purpose of its inclusion was as a possible basis upon which to predicate damages for infringement.

The cases cited by the Court are inapplicable.

In the case of *Wade v. Leander,* 165 U. S. 624, at page 628, the Court said:

> "We are unable to discover in this case that plaintiff specially set up and claimed, at the proper time and in the proper way, any right under the laws of the United States, or that any such right was denied him by the decision of the state courts."

In the case of *Albright v. Teas,* 106 U. S. 613 at page ....., the Court said:

> "The suit was brought to recover the consideration of this transfer, and was not based on the letters patent."

In the case of *Wilson v. Sanford,* 10 How. 99, 101 at page 102, the Court said:

> "* * * The object of the bill is to have this contract set aside and declared to be forfeited; * * *."

In the case of *Hartell v. Tilghman,* 99 U. S. 547 at page 552, the Court said:

> "* * * The object of the bill is to have this contract set aside and declared to be forfeited; * * *."

In the case of *Brown v. Shannon,* 60 U. S. at page 56, the Court said:

> "* * * Upon looking, however, carefully into the bill, we think it must be regarded and treated as a proceeding to enforce the specific execution of the contracts referred to, and not as one to protect the complainants in the exclusive enjoyment of a patent right."

In the case of *Marsh v. Nichols, Shepard & Co.,* 140 U. S. 344 at page 353, the Court said:

> "The bill was filed in the Circuit Court of Calhoun County for the specific performance by defendants below, * * *"

The case of *Dale Tile Manufacturing Co. v. Hyatt,* 125 U. S. 46, was a suit directly on a contract involving no infringement.

In the case of *Briggs v. United Shoe Machinery Company,* 239 Fed. Reporter, 48 at page 49, the Court said:

> "The bill shows that its dominant and ultimate object is to enforce payment of royalties reserved to the plaintiff by a contract * * *."

Restrictions.

Respondents allege *exclusive sales rights for both machines and parts,* as coming from the license agreement executed October 19, 1922, by and between Leaver, Parker and Evans. (R. 54-72.) Their contentions that the license to sell granted Parker therein is exclusive is a subterfuge. Parker was restricted in several essential respects. Illustrating that the license is clearly and definitely restricted in such man-

ner as to prevent Parker monopolizing and restraining interstate commerce attention is called to some of the restrictions:

> "16. It is further understood and agreed that licenses may be granted to others for the manufacture and sale of the herein licensed inventions under *terms and conditions which may be mutually agreed to by and between the parties hereto.*" (R. 67.)
>
> "23. It is further understood and agreed between the parties hereto that the selling price of said machines is to be established and modified, from time to time, *mutually by the parties hereto,* as trade conditions may render advisable and necessary." (R. 70.)
>
> "7. It is understood and agreed to by and between the parties hereto, that this Contract Agreement or the interest of either party thereto and therein, *shall not be assigned, transferred, or set over* by either party hereto *without the consent of the other parties* being first asked and obtained in writing, so to do." (R. 60, 61.) (Italics ours.)

Signode's contention that the purchase of machines was without restriction is contrary to the fact in the record, quoting from the Signode license (R. 755):

> "1. Paragraph 3 of said agreement is hereby amended to read as follows: Signode shall have the exclusive right to sell and/or distribute machines and parts throughout all of the United States *other than* the states of California, Texas, Arizona, New Mexico, Nevada, Oregon, Washington, Montana, Utah and Idaho, together with the

exclusive right to sell and/or distribute machines and parts (631) in and throughout the states of California, Texas, Arizona, New Mexico, Nevada, Oregon, Washington, Montana, Utah and Idaho, to the *newspaper and publishing trade only.*"

It is therefore clear from the record that Signode had no right to sell machines in the State of California *other than to the newspaper and publishing trade.* The machines sued upon are not used by that trade.

As the restriction was legal Signode is liable for the machines sold outside the scope of the license because it has used the invention *without license* to do so. (*General Talking Pictures Corp. v. Western Electric Co.,* 59 S. Ct. 355, 305 U. S. 675.)

CONCLUSION.

In conclusion it is respectfully submitted that this case is one particularly appropriate for review by this Court, since:

(a) The primary intent of respondents was to accomplish their monopoly by restraining and obstructing the interstate commerce in automatic wire binding machines and *unpatented repair and replacement parts.*

(b) As a result of respondents' conspiracy and acts in furtherance thereof there was a direct restraint upon interstate commerce, whether that commerce be in trade in *patented* automatic machines or *unpatented* repair and replacement parts, because such business substantially involves interstate commerce.

(c) The present decision is in conflict with the uniform decisions of this Court.

It is submitted that the decision of the Circuit Court of Appeals for the Ninth Circuit here involved has incorrectly decided all issues presented in the case and that said decision should be reversed. Respondent therefore prays that said decision be reversed and for such other and further relief as may seem proper in the premises.

Dated, Washington, D. C.,
November 24, 1941.

Respectfully submitted,
CHARLES E. RIORDAN,
C. RUSSELL RIORDAN,
Attorneys for Petitioner.

BOOTH B. GOODMAN,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 762

Office Supreme Court, U. S.
FILED
DEC 22 1941
CHARLES ELMORE CROPLEY
CLERK

JAMES M. LEAVER, JR., *Petitioner,*

vs.

CITIZENS NATIONAL TRUST AND SAVINGS BANK OF RIVERSIDE, a National Banking Corporation, and DONALD PARKER, as Administrator with the Will Annexed of the Estate of GEORGE D. PARKER, Deceased, FOOD MACHINERY CORPORATION, a Corporation, SIGNODE STEEL STRAPPING COMPANY, a Corporation, PARKER MACHINE WORKS, INC., a Corporation, JOHN D. CRUMMEY and WIRE TIE MACHINERY COMPANY, a Corporation, *Respondents.*

Brief for Respondents In Opposition to Petition for Writ of Certiorari

HERBERT L. THOMPSON,
Citizens National Bank Building,
Riverside, California,
Attorney for Citizens National Trust and Savings Bank and Donald Parker, as Parker Estate Administrators, and Wire Tie Machinery Company.

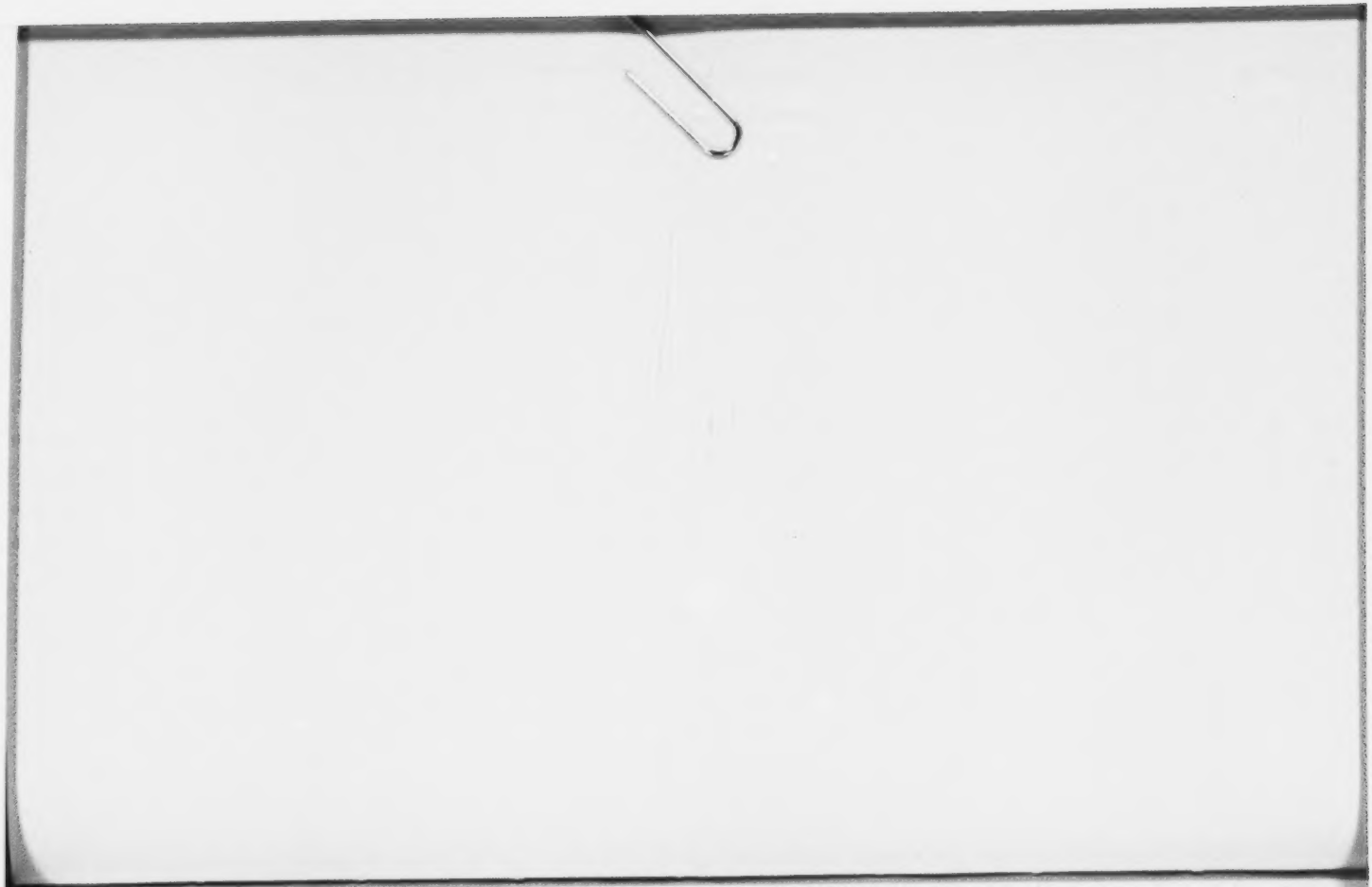
HERBERT W. CLARK,
ROLAND C. FOERSTER,
Crocker Building,
San Francisco, California,
Attorneys for Food Machinery Corporation and John D. Crummey.

ALLAN P. MATTHEW,
EDWIN S. PILLSBURY,
1500 Balfour Building,
San Francisco, California,
Attorneys for Signode Steel Strapping Company and Parker Machine Works, Inc.

Of Counsel:
ROSS O. HINKLE,
141 W. Jackson Boulevard,
Chicago, Illinois,
BOICE GROSS,
MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,
Crocker Building,
San Francisco, California,
MCCUTCHEN, OLNEY, MANNON & GREENE,
1500 Balfour Building,
San Francisco, California.

Dated at San Francisco, California, December 18, 1941.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO



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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 762

JAMES M. LEAVER, JR., *Petitioner,*
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CITIZENS NATIONAL TRUST AND SAVINGS BANK OF RIVERSIDE, a National Banking Corporation, and DONALD PARKER, as Administrator with the Will Annexed of the Estate of GEORGE D. PARKER, Deceased, FOOD MACHINERY CORPORATION, a Corporation, SIGNODE STEEL STRAPPING COMPANY, a Corporation, PARKER MACHINE WORKS, INC., a Corporation, JOHN D. CRUMMEY and WIRE TIE MACHINERY COMPANY, a Corporation,
Respondents.

Brief for Respondents In Opposition to Petition for Writ of Certiorari

INTRODUCTORY

Petitioner sought to invoke the jurisdiction of the Federal District Court upon the ostensible ground that respondents had violated the federal anti-trust and patent laws. In form petitioner undertook to set forth causes of action under federal law, but in substance petitioner was attempting to establish private rights, arising upon contract. Respondents moved for a summary judgment under Rule 56 of the Federal Rules of Civil Procedure, basing

their motions upon a comprehensive record, largely documentary. The District Court granted the motions, and judgment was entered for respondents on the merits.

Petitioner thereupon appealed to the Circuit Court of Appeals, which found that

> "The pleadings and affidavits showed that the action did not arise under the patent laws or the anti-trust laws and did not really and substantially involve any dispute or controversy properly within the jurisdiction of the District Court." (R. 1573)

and that

> "The action arose upon and involved the construction and interpretation of a contract which, among other things, granted a license for the manufacture and sale of machines embodying inventions for which patents had been issued or applied for." (R. 1574)

and that

> "The only controversy which this action really and substantially involved was a controversy as to who were Parker's and Evans' successors in interest. The gravamen of the complaint was that appellees [respondents] and their codefendants had claimed and were claiming to be such successors and had exercised and were exercising rights which the contract had vested in Parker and Evans; whereas, according to the complaint, appellant [petitioner] had succeeded to and was entitled to exercise all of said rights.
>
> Appellant [petitioner] did not challenge the legality or validity of the contract or seek its avoidance. Instead, he relied on it and claimed under it, as did his adversaries." (R. 1575)

The court then concluded:

> "We therefore regard as frivolous appellant's [petitioner's] characterization of his adversaries' acts as patent infringements and violations of the anti-trust laws." (R. 1575)*

Thus the Circuit Court, upon the entire record, found that the only controversy really and substantially involved was over "the construction and interpretation of a contract". (R. 1574) Such a controversy does not present any situation contemplated by Rule 38 of this court.

The petition does not correctly present any question raised by the decision of the Circuit Court; nor does it state any reason properly arising from that decision for granting a writ of certiorari.

According to our view, the issues set forth as "Questions Presented" on page 9 of the petition are wholly unwarranted by the judgment and opinion of the Circuit Court.

The Circuit Court did not hold, as recited in the petition, that the "U. S. District Court is without jurisdiction to inquire into the legality of the conspiracy and acts which have wholly eliminated the party seeking relief from continuing in his established business in interstate commerce, and creating a monopoly in his competitor." Nor did it hold "in effect that the interpretation of a contract incidentally involved in a suit under the anti-trust laws deprives the U. S. District Court

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*Reported in 121 Fed.(2d) 738; opinion printed in full in the appendix hereto.

of jurisdiction, even where the restraint of interstate commerce is admitted, the damage established and the contract itself is pertinent to show the measure of damages and the illegality of the acts of the conspirators." Nor did it hold "that the second cause of action in the complaint for infringement, and in which no violation of a contract is pleaded by petitioner and no relief prayed for thereunder, is an action ex-contractu and not an action in tort under the patent laws of the United States." What the Circuit Court really held was that the only substantial controversy involved the interpretation of a contract under which petitioner was claiming rights and denying rights to the respondents, and under which, on the other hand, the respondents were asserting rights and denying that some of the rights claimed by petitioner were his.

Likewise, petitioner's "Reasons Relied upon for Allowance of Writ" (Petition, pages 9 and 10) are unresponsive to the decision of the Circuit Court. (1) The Circuit Court did not rule "that a combination in restraint of trade can contract against liability under the anti-trust laws". There is nothing in the record remotely suggesting a "contract against liability under the anti-trust laws". (2) Nor did the Circuit Court rule that anyone "can be exempted from application of the anti-trust laws". The ruling was that the controversy between the parties as to their respective rights and interests derived from a contract does not present an issue arising under the anti-trust laws. (3) Nor did the Circuit Court depart from "the accepted and usual course of judicial proceedings". The gratuitous nature of the charges tendered by the petitioner as ostensible violations of the federal stat-

utes is plain upon the record. The Circuit Court concluded of necessity that it was "frivolous" on the petitioner's part to characterize his adversaries' acts as "patent infringements and violations of the anti-trust laws".

STATEMENT

A. The facts show that the controversy arose over conflicting claims under a contract, which the California state courts had already decided.

The controversy between petitioner and respondents stems from a contract entered into on October 19, 1922, between petitioner Leaver, George D. Parker and Charles E. Evans. (R. 54-72) This is the contract as to which the Circuit Court of Appeals said: "Appellant [petitioner] did not challenge the legality or validity of the contract or seek its avoidance. Instead, he relied on it and claimed under it, as did his adversaries." (R. 1575)

Under the terms of this 1922 contract, petitioner granted to Parker the exclusive right to manufacture, or to have manufactured, and to sell automatic wire tying machines (frequently termed "wire-ties") and repair and replacement parts thereof, embodying inventions set forth in patents petitioner then owned or might thereafter own or control. (R. 57, 59, 66) Evans granted similar rights to Parker. (R. 58, 66)

The contract further provided (1) that Parker should receive 25% of cost price as manufacturing profit, (2) that petitioner and Evans might take orders for machines manufactured by Parker and receive a 10% commission

"after the money for said sold machines shall have been received by" Parker, and (3) that the net profit was to be divided 40% to Parker, 40% to petitioner and 20% to Evans. No one disputes petitioner's rights as here set out.

Parker manufactured and sold machines under this 1922 contract until he died in 1930. The contract provided that the rights of each party thereunder should "continue for the benefit of the heir, executor or administrator", except that, upon Parker's death, the manufacturing rights should vest in petitioner and Evans as tenants in common. (R. 70, 71)

Upon Parker's death petitioner refused to recognize the rights of the Parker heirs, as represented by the executrix, Clara B. Parker. He gave written notice that he "would not consent to the conduct of any of said business or any part thereof by Clara B. Parker as such executrix". (R. 13) That difficulty was temporarily solved by a five-year contract made on July 14, 1931, whereby the business was conducted by a so-called "Owners' Committee", on which petitioner, the Parker heirs and Evans (and after Evans' death his heir and executrix) each had a representative or served in person. (R. 14, 16, 83-91)

The death of Evans in 1934 brought another crisis because of petitioner's refusal to recognize the rights of either the Evans' executrix and heir (Mrs. Minnie Amanda Evans) or the Parker heirs. Petitioner gave notice that at the end of the five-year "Owners' Committee" regime (i. e., July 14, 1936) he "would take over the management and control of the business of manufacture and sale of machines and parts". (R. 18, 1336) This demand of peti-

tioner precipitated a suit for declaratory relief brought by Mrs. Evans in the Superior Court of California for Riverside County, in which petitioner and two of the respondents, the Parker estate administrators (Parker's executrix in the meantime having died), were named as defendants.

In that suit petitioner claimed that all rights of manufacture and of sale and control under the 1922 contract had become vested solely in him. (R. 13, 18, 1336) He based his claims then, as in the immediate action, upon the contention that the 1922 contract created a partnership or "joint adventure partnership" and that he, as sole survivor, was possessed of all rights of manufacture, sale and control. (R. 894, 1335-1337, 1352)

The Superior Court decided against petitioner's contentions. It found:

(a) "Under the contract of October 19, 1922, Parker, until his death, owned and had the exclusive right to manufacture and sell all wire-ties and parts referred to in said contract * * *" (R. 1368)

(b) "Upon the death of Parker, the exclusive manufacturing right theretofore owned and had by him under said contract of October 19, 1922, passed to, and vested in Evans and Leaver [petitioner] as tenants in common * * * " (R. 1370)

(c) "Upon his [Parker's] death the exclusive right to sell such machines and parts passed to, and vested jointly in his heirs, subject to the administration of his estate * * *" (R. 1369)

And upon these findings, the Superior Court decreed:

(1) "The right to manufacture said machines and parts is vested in plaintiff [Evans' executrix,

Minnie Amanda Evans], and the heirs of Evans, and in Leaver [petitioner] as tenants in common." (R. 1383)

(2) "The heirs of Parker jointly, subject to the administration of his estate, own and have the exclusive right to sell wire-ties and parts therefor within and throughout the United States of America and its territorial possessions and in foreign countries, except that Leaver [petitioner] and the heirs and executrix of Evans each have the right to take orders for such machines and parts and to have said orders filled by the heirs of Parker and the administrators of his estate, and to receive the selling commissions referred to in the contract of October 19, 1922 on orders so taken." (R. 1382)*

Upon petitioner's appeal this decree was affirmed and became final.

Evans v. Citizens National Trust and Savings Bank et al., 29 Cal. App.(2d) 133, 84 Pac.(2d) 218.

On August 31, 1936, by order of the Superior Court of California for Riverside County, the Parker Estate admin-

*It will be noted that the rights of the parties under the contract, as determined by the declaratory judgment, comprehend the manufacture and sale of both machines "*and parts*". Accordingly petitioner has no standing to complain (Petition, pp. 20, 21) of the sale of parts by those who have succeeded to the sales rights. Petitioner has at no time been precluded from exercising his separate right under the contract to take orders for both machines and parts, clearing such orders through the sales agency created by the contract and as determined in the declaratory judgment.

istrators sold substantially all the estate assets to the Nailer Machinery Company (now respondent Wire Tie Machinery Company). (R. 908) Among those assets was the estate's interest under the 1922 contract. Thereby, through descent and by probate sale under court order, Wire Tie Machinery Company became the owner of the exclusive sales rights for machines and repair and replacement parts which originally had been granted to and exercised by Parker.*

On October 14, 1936 Mrs. Evans entered into an agreement with respondent Parker Machine Works, Inc., whereby, in the exercise of her several right to manufacture or have manufactured, she authorized the latter to manufacture, or to have manufactured in her behalf, machines and repair and replacement parts. (R. 322) Pursuant to this contract Parker Machine Works, Inc. has

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*By express provision of the 1922 contract the exclusive sales rights granted to Parker were to continue after his death for the benefit of his "heir, executor or administrator". (R. 70-71) Petitioner has sought to deprive the Parker heirs of these rights, and has denied the efficacy of their transfer by the probate sale to Wire Tie Machinery Company. The asserted "conspiracy" charged by petitioner is supposed to have had its inception in this probate sale. It is well settled that a simple covenant against assignment does not bar involuntary assignments by operation of law, as by purchases at probate sale. (*California Packing Corp. v. Lopez*, 207 Cal. 600, 603, 279 Pac. 664 (1929); *Francis v. Ferguson*, 246 N.Y. 516, 159 N.E. 416 (1927); *Gazlay v. Williams*, 147 Fed. 678, 682-683 (CCA 6th, 1906) (aff'd. 210 U.S. 41).) Moreover, the order of the California Superior Court confirming the sale of the Parker estate assets is not subject to collateral attack and is of course binding upon the federal courts. (*Newberry v. Wilkinson*, 199 Fed. 673 (CCA 9th, 1912); *Simmons v. Saul*, 138 U.S. 439, 11 S. Ct. 369, 34 L. Ed. 1054 (1891).)

had machines and parts manufactured by respondent Food Machinery Corporation.*

B. Proceedings in District Court.

By his complaint petitioner pleaded that the 1922 contract gave rise to a "joint adventure" of which petitioner is the "sole survivor" and that he, "but for the wrongful acts of the defendants", would "conduct the business of said 'Project' ". (R. 3, 9-10, 23) While petitioner sought to invoke the jurisdiction of the District Court under the federal anti-trust and patent laws, he set forth in his pleading the record of his efforts to seize for himself alone complete control of the business enterprise in which he has in fact a partial interest only. (R. 13, 18, 21) He advanced the same claims as to his rights which he had advanced in the state courts of California. By the prayer of his complaint he sought, *inter alia,* a decree establishing in him the rights which he claimed under the 1922 contract and negativing the rights claimed by respondents under that contract. (R. 159-160) Respondents were charged with allegedly wrongful "acts and things" represented almost entirely by the exercise of the rights which they severally claimed as arising out of the 1922 contract and their resist-

*Petitioner has sought to deprive Mrs. Evans, sole heir of her deceased husband, of her several right of manufacture. (R. 18, 502, 505, 894, 1335-1338) But her right to manufacture was expressly upheld by the declaratory judgment in the California courts. It is settled, moreover, that one who acquires rights by operation of law, e. g., by inheritance, takes such rights discharged of the covenant against assignment. (*Bemis v. Wilder,* 100 Mass. 446 (1868); *In re Prudential Lithograph Co.,* 270 Fed. 469, 472 (CCA 2d, 1920); 2 *Thompson on Real Property,* Section 1403, pp. 536, 537.)

ance to the petitioner's adverse claims of exclusive rights in him.

The respondents moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.* The motions were grounded upon an ample record including

(1) the pleadings, in which were incorporated the contracts upon which petitioner relies;

(2) the judgment roll in the state court declaratory judgment action;

(3) the transcript of the proceedings upon the probate sale of the Parker estate assets;

(4) admissions on file, either in response to interrogatories or to demands for admissions or otherwise made of record.

The record, primarily documentary in character, establishes the material facts beyond dispute. The motions for summary judgment were granted. The District Court made findings and conclusions and entered judgment thereupon. (R. 1437-1488)

C. Decision of the Circuit Court.

Petitioner appealed to the Circuit Court of Appeals for the Ninth Circuit, and, as previously noted, the court concluded, upon the record, that "the action did not arise

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*Rule 56 provides in part that:

"The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

under the patent laws or the anti-trust laws and did not really and substantially involve any dispute or controversy properly within the jurisdiction of the District Court". (R. 1573)

ARGUMENT

I.

THE CIRCUIT COURT CORRECTLY HELD THAT THE RECORD SHOWED THAT THE ACTION DID NOT ARISE UNDER THE PATENT LAWS OR THE ANTI-TRUST LAWS AND DID NOT REALLY AND SUBSTANTIALLY INVOLVE ANY DISPUTE OR CONTROVERSY PROPERLY WITHIN THE JURISDICTION OF THE DISTRICT COURT.

Petitioner, having failed to establish the rights which he claimed under his partnership and survivorship contentions in the California state courts, has sought to relitigate them in the federal courts. He has done so by attempting to frame a complaint charging violation of the anti-trust acts and the patent laws.

(a) This is not a case wherein jurisdiction of the federal courts was or can be determined on pleadings alone. Lack of jurisdiction is established by the record facts and by petitioner's real contentions.

Petitioner confuses the issues. He contends that his complaint charges acts which constitute violations of the anti-trust acts and of the patent laws and argues that the Circuit Court was wrong in directing a dismissal of his complaint upon finding, after consideration of the facts of record, that the case is not within the jurisdiction of the federal courts.

Respondents' motions for summary judgment were not grounded merely on the insufficiency of the complaint. What petitioner has failed to appreciate is that, even though the allegations of his complaint might attempt to present a case within the anti-trust and the patent laws, if the record facts show that the case does not substantially involve either the anti-trust acts or the patent laws, it is not properly within the jurisdiction of the federal courts.

Thus as this court said, through Mr. Justice Brandeis, in *Lambert Run Coal Company v. Baltimore & Ohio Railroad Company,* 258 U.S. 377, 382, 383, 66 L. Ed. 671, 675 (1922):

> "To the situation here presented, cases like *Healy v. Sea Gull Specialty Co.,* 237 U.S. 479, 59 L. ed. 1056, 35 Sup. Ct. Rep. 658, relied upon by appellant, have no application. For while it is true that a plaintiff by his first pleading determines what right he will sue on, and that the defenses, set up either anticipatorily by him or in due course by the defendant, cannot affect the jurisdiction when it depends on that right, yet the plaintiff may not, by alleging a frivolous claim or a fictitious situation, confer upon a court jurisdiction which, as determined by the plaintiff's real cause of action, it has not. *The Fair v. Kohler Die & Specialty Co.* 228 U.S. 22, 25, 57 L. ed. 716, 717; 33 Sup. Ct. Rep. 410."

This case does not present a situation where its jurisdictional status can be determined from the complaint alone. By the record in and prior judgment of the state courts of California, affidavits, admissions, documents volunteered or produced upon demand, and a deposition, sufficient facts were before the District Court to convince that court (1) that there was no material issue of fact (R.

1479), and (2) that respondents were entitled to summary judgment under Rule 56 of the Rules of Civil Procedure. (R. 1437-1488) On appeal the Circuit Court determined that the case did not really and substantially involve any dispute or controversy cognizable under the anti-trust or patent laws. (R. 1571-1575) The Circuit Court, therefore, affirmed the judgment of the District Court that petitioner's complaint should be dismissed; not, however, on the merits of the controversy, but on the ground that the federal courts lacked jurisdiction.

Therefore, the petition could properly present only the question whether the facts before the Circuit Court make it appear that this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the federal courts and thus require dismissal pursuant to the mandatory provisions of Section 37 of the Judicial Code. (28 U.S.C. §80)

(b) The real controversy between the parties involves rights arising from a contract. Petitioner's contentions respecting such rights have been finally decided adversely to him by the California state courts.

In substance and in reality, if not in form, petitioner bases his entire case upon the interpretation of the 1922 contract on which he relies as the source of his rights. The gravamen of his cause of action, as the Circuit Court properly concluded, was that respondents had exercised and were exercising rights which petitioner claimed he alone was entitled to exercise. (R. 1575)

This suit is in pursuance of a program which petitioner has persistently followed since 1930 to gain for himself the exclusive control of an enterprise which was born of

the 1922 contract. It evidences the determination of petitioner to exclude the successors in interest of the deceased parties to that contract, and to combat the lawful exercise of their rights.

Petitioner's case is founded upon his contention that the 1922 contract created a partnership or at least a joint adventure whereby, upon the subsequent deaths of Parker and Evans, petitioner, as the last survivor, became possessed of the right of exclusive control of the alleged partnership property both tangible and intangible. Thus it is significant that in his prayer he seeks, *inter alia*, a decree that

> (1) the 1922 license agreement is a contract of partnership;
>
> (2) petitioner as sole survivor is entitled to custody of the books, papers, records and property, and "to direct and manage the business of the partnership without interference by, from or on behalf of the defendants * * *";
>
> (3) Parker's administrators and the Parker heirs "have by reason of their wrongful acts divested themselves of any right or rights under the said contract * * *";
>
> (4) Mrs. Evans has divested herself of her right of manufacture;
>
> (5) the administrators' sale of the Parker Estate assets "did not transfer any interest in licenses granted or patents or applications for letters patent described in the contract * * *". (Complaint, R. 159-160)

On the other hand, respondents' position is that the 1922 contract did not create a partnership or joint adventure

or, in any event, did not provide for the vesting in petitioner alone of rights—particularly the exclusive manufacturing and sales rights and the right of control—which he claims under and by virtue of the contract upon the deaths of Parker and Evans.

The interpretation of the 1922 contract, particularly in respect to the devolution of the rights therein created, was finally decided adversely to petitioner by the courts of the State of California.

(c) The charges of violation of the anti-trust acts and of the patent laws are based primarily upon respondents' refusals to comply with demands made by petitioner in excess of his lawful rights, resistance to petitioner's efforts to "take over the management and control of the business of manufacture and sale of machines and parts" and respondents' exercise of rights which are severally theirs.

Petitioner charges a violation of the anti-trust laws on the ground that respondents have interfered with his right to compete with the enterprise which he helped to create. In fact there has been no such interference. The rights which were secured to petitioner under the 1922 contract have at all times been fully recognized by respondents. Petitioner purports to find a "conspiracy" proceeding from the probate sale of the assets of the Parker estate. (R. 146) He charges a violation of the patent laws on the ground that respondents have infringed patents as to which he, in and by the 1922 contract, granted to Parker exclusive manufacturing and selling rights, with specific provisions for successorship. Such manufacturing rights, under the provisions of the agreement and in conformity with the declaratory judgment in the state courts, passed to petitioner and to Mrs. Evans (sole heir of her deceased husband) as tenants in common, i. e., to be exercised either

jointly or severally. The exclusive selling rights, which were granted to Parker and which continued for the benefit of his heirs, became vested in respondent Wire Tie Machinery Company as purchaser at the probate sale. Petitioner, as heretofore noted, has refused to recognize the rights and interests of respondents as to manufacture and sale, notwithstanding that they have been judicially determined in the California state courts.

Petitioner's accusations of violation of the anti-trust and patent laws are based on allegedly wrongful "acts and things" which may be assigned roughly to two categories, or groups, viz., (1) refusal of certain of the respondents to comply with demands made by petitioner in excess of his actual rights, and (2) actions taken by the several respondents in the exercise of their rights.

In the first of these groups may be placed (a) the refusal of the Parker administrators to comply with petitioner's demand that all of the books, records and manufacturing equipment of the "project" be surrendered to him (R. 19, 20, 155); (b) the resistance of Mrs. Evans and the Parker administrators to the notice given by petitioner, upon the death of Evans, that petitioner proposed to "take over the management and control of the business of manufacture and sale of machines and parts" (R. 18); (c) the refusal of the Signode Company to pay over to petitioner the entire amount of the indebtedness due for machines purchased from the "project" during the term of the Owners' Committee arrangement. (R. 37-38) (Petitioner was legally entitled to but 40% of such indebtedness and the remaining 60% belonged to and was being claimed by Parker's successors and Mrs. Evans.) (R. 1019-1031, 1056-1069)

Matters falling within the second group are illustrated by (a) the administrators' sale of the assets of the Parker estate pursuant to orders and decrees of the probate court, eventuating in the acquisition of the sales rights by respondent Wire Tie Machinery Company (R. 39, 150-151); (b) the manufacture of machines by respondent Food Machinery Company upon orders from Parker Machine Works, Inc., pursuant to the contract between it and Mrs. Evans under her adjudicated manufacturing rights (R. 153-154); (c) the selling and distribution by respondent Signode Company of machines lawfully acquired by it but which petitioner nevertheless charges were sold in the northern district of California contrary to the terms of a contract which petitioner concedes had expired and which he would not extend (Petition, 5); and (d) the leasing by respondent Signode Company of machines, lawfully purchased by it, upon terms providing that the repair and replacement parts and wire used therein be purchased from it. (R. 29-30, 35-36) (The Signode Company had acquired title to the machines by outright purchase, and without any restriction on the right of use. (R. 491, 749) Moreover, petitioner does not allege or show that he is interested in the wire supply business.)

This enumeration is not exhaustive but it is representative and serves to disclose the nature of the "acts and things" which petitioner has assembled and which he tenders as ingredients of a "conspiracy" supposed to have had its inception in the probate sale of the assets of the Parker estate.

It is the characterization of these "acts and things" as patent infringements and violations of the anti-trust laws which the Circuit Court deemed "frivolous".

Plainly the alleged violations of the anti-trust laws and patent laws are grounded upon petitioner's contention that under the contract of 1922 he alone has the right to do what the respondents are severally doing. He charges respondents with violation of the anti-trust laws and patent laws, because they are exercising rights which he says belong exclusively to him,—an exclusiveness which the California state courts finally decided does not belong to him.

Petitioner's difficulties are of his own making. They are due entirely to his unwillingness to abide by the interpretation given to the 1922 contract by the California state courts and to his refusal to recognize the rights of the successors to the other parties to that contract. Petitioner has not been "excluded" from the exercise of any rights which he may justly claim. He has simply failed to secure for himself complete control of a "project" in which he has a partial interest only.

II.

PETITIONER HAS FAILED TO PRESENT A CASE CALLING FOR THE EXERCISE OF THE POWER OF SUPERVISION OF THE SUPREME COURT OF THE UNITED STATES.

The case tendered by the petition does not satisfy any of the criteria customarily observed in the granting of a writ of certiorari. None of the situations contemplated by Rule 38 of this court has been shown to exist.

It is not represented that the decision to which the petition is directed is in conflict with the decision of another Circuit Court.

It does not appear that the Circuit Court has decided "an important question of Federal law which has not been, but should be, settled by this court."

It does not appear that the Circuit Court has decided a federal question "in a way probably in conflict with applicable decisions of this court" or that it has "departed from the accepted and usual course of judicial proceedings."

The petition reveals nothing other than a controversy between petitioner and the respondents respecting the rights and interests derived from a certain contract, and respecting the manner or method of exercising such rights. This is a private controversy, and in all essential respects it had already been determined adversely to petitioner in the state courts of California before the respondents' motions for summary judgment were granted by the District Court.

CONCLUSION

Respondents submit:

1. That none of the purported "Questions Presented" and none of the alleged "Reasons Relied Upon * * *" find the slightest support in the opinion of the Circuit Court.

2. That the only real and substantial issue in the case is one of contract interpretation, which the courts of the State of California have already decided adversely to petitioner's contentions.

3. That the petition raises no issue or question of conflict of decision, or of public concern, or of misunderstanding or misinterpretation of federal law.

4. That the petition should be denied.

Respectfully submitted,

HERBERT L. THOMPSON,
Citizens National Bank Building,
Riverside, California,
Attorney for Citizens National Trust and Savings Bank and Donald Parker, as Parker Estate Administrators, and Wire Tie Machinery Company.

HERBERT W. CLARK,
ROLAND C. FOERSTER,
Crocker Building,
San Francisco, California,
Attorneys for Food Machinery Corporation and John D. Crummey.

ALLAN P. MATTHEW,
EDWIN S. PILLSBURY,
1500 Balfour Building,
San Francisco, California,
Attorneys for Signode Steel Strapping Company and Parker Machine Works, Inc.

Of Counsel:

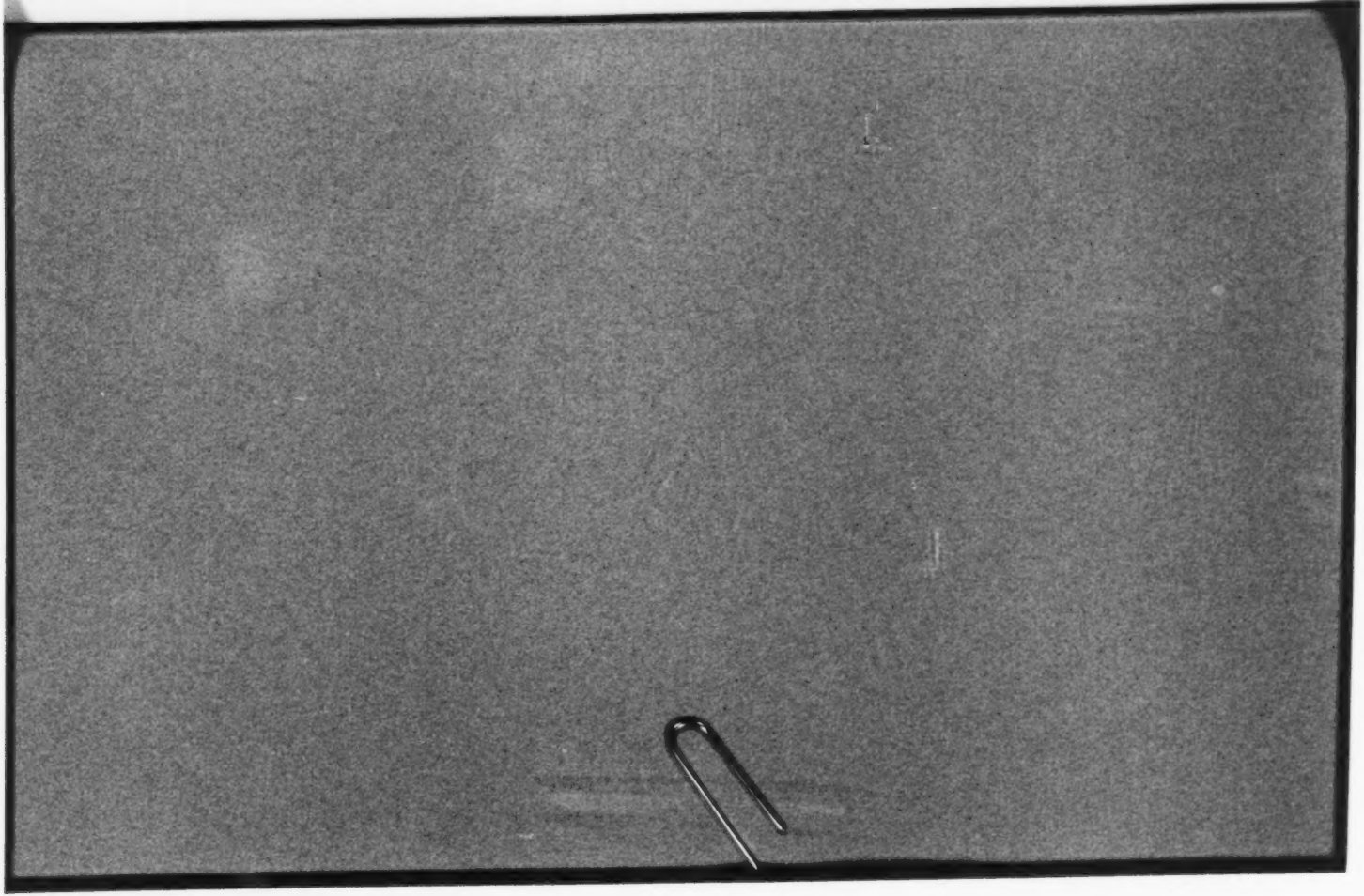
ROSS O. HINKLE,
141 W. Jackson Boulevard,
Chicago, Illinois,

BOICE GROSS,
MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,
Crocker Building,
San Francisco, California,

MCCUTCHEN, OLNEY, MANNON & GREENE,
1500 Balfour Building,
San Francisco, California.

Dated at San Francisco, California,
December 18, 1941.

APPENDIX FOLLOWS.



Appendix

No. 9671

In the United States Circuit Court of Appeals for the Ninth Circuit

James M. Leaver, Jr.,

Appellant.

vs.

Citizens National Trust and Savings Bank of Riverside, a National Banking Corporation, and Donald Parker, as Administrators with the Will Annexed of the Estate of George D. Parker, Deceased, Food Machinery Corporation, a Corporation, Signode Steel Strapping Company, a Corporation, Parker Machine Works, Inc., a Corporation, John D. Crummey and Wire Tie Machinery Company, a Corporation,

Appellees.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

OPINION

Before: Denman, Mathews and Healy, Circuit Judges.

MATHEWS, Circuit Judge:

This appeal is from a summary judgment in an action by appellant[1] against appellees[2] and others[3] in the District Court of the United States for the Northern District of California.

The District Court's jurisdiction was invoked upon the ground that the action was one arising under the patent laws and the antitrust laws. No other ground of jurisdiction was asserted. Jurisdiction was not predicated upon diversity of citizenship and could not be, for appellant and several of the appellees are citizens of the same State.

The complaint was filed on September 20, 1938, and was amended on July 14, 1939. Appellees answered the amended complaint and, pursuant to Rule 56 of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c,[4] moved with supporting affidavits for a summary judgment in their favor. Appellant filed and served opposing affidavits. The motions were heard and granted, and judgment for appellees was accordingly entered. This appeal followed.

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[1]James M. Leaver, Jr., a citizen of California.

[2]Donald Parker and Citizens National Trust & Savings Bank of Riverside, California, as administrators with the will annexed of the estate of George D. Parker, deceased; Parker Machine Works, Incorporated, a California corporation; Wire Tie Machinery Company, a California corporation; Signode Steel Strapping Company, a Delaware corporation; Food Machinery Corporation, a Delaware corporation; and John D. Crummey.

[3]Minnie Amanda Evans and John W. Leslie.

[4]"A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof. * * * The motion shall be served at least 10 days before the time specified

The pleadings and affidavits showed that the action did not arise under the patent laws or the antitrust laws and did not really and substantially involve any dispute or controversy properly within the jurisdiction of the District Court. Therefore, instead of entering judgment on the merits, the court should have dismissed the action for want of jurisdiction. Judicial Code, §37, 28 U.S.C.A. §80.[5]

The action arose upon and involved the construction and interpretation of a contract which, among other things, granted a license for the manufacture and sale of machines embodying inventions for which patents had been issued or applied for. That, however, did not make it an action arising under the patent laws. Wilson v. Sandford, 10 How. 99, 101, 13 L. Ed. 344; Brown v. Shannon, 20 How. 55, 15 L. Ed. 826; Hartell v. Tilghman, 99 U. S. 547, 25 L. Ed. 357; Albright v. Teas, 106 U. S. 613, 616-620, 1 S. Ct. 550, 27 L. Ed. 295; Dale Tile Mfg. Co. v. Hyatt, 125 U. S. 46, 51-53, 8 S. Ct. 756, 31 L. Ed. 683; Marsh v. Nichols, Shepard & Co., 140 U. S. 344, 354-359, 11 S. Ct. 798, 35 L. Ed. 413; Wade v. Lawder, 165 U. S. 624, 627,

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for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

[5]"If in any suit commenced in a district court * * * it shall appear to the satisfaction of the said district court, at any time after such suit has been brought * * * that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, * * * the said district court shall proceed no further therein, but shall dismiss the suit * * * and shall make such order as to costs as shall be just."

628, 17 S. Ct. 425, 41 L. Ed. 851; Geneva Furniture Mfg. Co. v. S. Karpen & Bros., 238 U. S. 254, 259, 35 S. Ct. 788, 59 L. Ed. 1295; Briggs v. United Shoe Machinery Co., 239 U. S. 48, 36 S. Ct. 6, 60 L. Ed. 138; Luckett v. Delpark, 270 U. S. 496, 502-511, 46 S. Ct. 397, 70 L. Ed. 703.

The contract referred to was made by George D. Parker, Charles E. Evans and appellant on October 19, 1922, was in effect continuously thereafter and, presumably, is still in effect. Parker died on August 24, 1930. Evans died on December 31, 1934. The only controversy which this action really and substantially involved was a controversy as to who were Parker's and Evans' successors in interest. The gravamen of the complaint was that appellees and their codefendants had claimed and were claiming to be such successors and had exercised and were exercising rights which the contract had vested in Parker and Evans; whereas, according to the complaint, appellant had succeeded to and was entitled to exercise all of said rights.

Appellant did not challenge the legality or validity of the contract or seek its avoidance. Instead, he relied on it and claimed under it, as did his adversaries. We therefore regard as frivolous appellant's characterization of his adversaries' acts as patent infringements and violations of the antitrust laws.

The judgment is modified so as to dismiss the action for want of jurisdiction. As thus modified, the judgment is affirmed.

(Endorsed): Opinion. Filed Jul. 17, 1941. Paul P. O'Brien, Clerk.

In the Supreme Court
OF THE
United States

Supreme Court, U.
FILED
JAN 3 1942
CHARLES ELMORE CROPL
CLERK

OCTOBER TERM, 1941

No. 762

JAMES M. LEAVER, JR.,
Petitioner,

vs.

CITIZENS NATIONAL TRUST AND SAVINGS BANK OF RIVERSIDE (a national banking corporation), and DONALD PARKER, as Administrators with the Will Annexed of the Estate of George D. Parker, Deceased, FOOD MACHINERY CORPORATION (a corporation), SIGNODE STEEL STRAPPING COMPANY (a corporation), PARKER MACHINE WORKS, INC. (a corporation), JOHN D. CRUMMEY and WIRE TIE MACHINERY COMPANY (a corporation),
Respondents.

REPLY BRIEF OF PETITIONER TO BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CHARLES E. RIORDAN,
National Press Building, Washington, D. C.,
Attorney for Petitioner.

BOOTH B. GOODMAN,
Latham Square Building, Oakland, California,
Of Counsel.

PARKAR-WALAR PRINTING CO., SAN FRANCISCO, CALIFORNIA

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In the Supreme Court

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OCTOBER TERM, 1941

No. 762

JAMES M. LEAVER, JR.,

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CITIZENS NATIONAL TRUST AND SAVINGS BANK OF RIVERSIDE (a national banking corporation), and DONALD PARKER, as Administrators with the Will Annexed of the Estate of George D. Parker, Deceased, FOOD MACHINERY CORPORATION (a corporation), SIGNODE STEEL STRAPPING COMPANY (a corporation), PARKER MACHINE WORKS, INC. (a corporation), JOHN D. CRUMMEY and WIRE TIE MACHINERY COMPANY (a corporation),

Respondents.

REPLY BRIEF OF PETITIONER TO BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The brief for respondents in opposition to the petition for writ of certiorari contains certain misstate-

ment which is believed to be of such importance as to be called to the attention of the Court prior to consideration of the writ of certiorari.

The implications of such misstatement are far reaching and if undisputed might result in grave injustice to the petitioner and the destruction of his business and property and adversely effect the anti-trust laws and patent law and the public.

Respondents' opposition brief contains the following undisputably false statement and implication at page 20 (emphasis supplied):

(a)

> "This is a private controversy, *and in all essential respects it had already been determined adversely to petitioner in the State Courts of California* before the respondents' motions for summary judgment were granted by the District Court."

The California State Courts referred to are the Superior Court for Riverside County, State of California, and the District Court of Appeal for the Fourth District of the State of California, and the decisions relied upon by respondents are those indicated on pages 7 and 8 of their opposing brief. Respondents quote from the decision of the Superior Court for Riverside County, State of California and fail to quote from the clarifying and controlling decision of the District Court of Appeal for the Fourth District on appeal taken by the petitioner. In the latter case, *Evans v. Citizens National Trust and Savings Bank, et al.*, 29 Cal. App. (2d) 133, 84 Pac. 218; the Court stated (emphasis supplied):

(b)

"It is argued that both *Leaver and the heirs of Evans have the right to sell* the machine *to anybody* and collect a commission. This is recognized by the decree * * *." (at page 143.)

(c)

"When Parker died the other two parties were living and under the plain meaning of the language used *the right to manufacture passed to them.*" (at page 139.)

The declaratory decree of the Superior Court of the State of California held (confirmed by the foregoing decision) that:

(d)

"The right to manufacture under said contract of October 19, 1922, includes the right to manufacture in the United States of America, its territorial possessions, and in foreign countries." (R. 1385.)

(e)

"Upon the death of Leaver, the manufacturing rights *and all other rights vested in him* will pass to, and vest in his heirs, executors and administrators." (R. 1385.)

On no construction could the decisions of the California State Courts (see (b), (c), (d) and (e) above) be held to have been "in all essential respects * * * determined adversely to the petitioner" as stated in respondents' opposing brief, (a) above. Clearly the decisions of the California State Courts (indicated

(b), (c), (d) and (e) above) affirm petitioner's right to sell and manufacture in intrastate, interstate and foreign commerce, automatic Wire-Tying machines and parts, whether patented or unpatented, and without restraint. It is important to note that respondents' brief at page 8 contains the statement:

> "Upon petitioner's appeal this decree was affirmed and *became final.*" Emphasis supplied.)

The very decision relied upon by respondents to bar petitioner from engaging in interstate commerce in the machines and parts in question definitely confirms petitioner's rights so to do. The very fact that respondents do not deny the exclusion, but claim they do so under rights, presents a basic issue under the Anti-Trust Laws which no Court, excepting the Federal Courts have jurisdiction to determine.

At this point it is important to note that the Brief filed on behalf of the Respondents in opposition to the grant of the Writ of Certiorari fails to point out any insufficiency in the pleadings of the complaint as amended or any misstatement in petitioner's affidavits or in the "Summary Statement of Matters Involved" of the Petition for Writ of Certiorari.

CONFLICTING DECISIONS EFFECTING INTERSTATE COMMERCE.

Following the admittedly "final" decisions of the California State Courts, the District Court in and for the Northern District of California, granted respondents' motions for summary judgment (see (a) above)

deciding adversely to the petitioner in several essential respects therefore decided favorably to petitioner by the California State Courts, including petitioner's right to sell to anyone, affirmed by State Courts (see (b) above). The error as to petitioner's right to sell is one of the points relied on by petitioner in the appeal as to such adverse decision. (Point 34, R. 1540.)

RESPONDENTS AVOID ARGUING JURISDICTION BY RAISING COLLATERAL ISSUES.

Respondents present arguments on controvertial issues not bearing on jurisdiction and which can be considered only when and if the Court assumes jurisdiction. Answering such arguments would be outside the issue presented by this petition. It is fundamental that jurisdiction is the power to determine such issues and to determine them the Court must assume jurisdiction.

The following cases cited in the opinion of the Circuit Court of Appeals are contrary to the conclusion reached by that Court and strongly support petitioner's contention:

In the case of *Luckett v. Delpark, Inc., et al.*, 270 U. S. Rep. 496, this Court held:

> "As appears from the statement of it, the plaintiffs' case arose under the patent law. It was not affected by the fact that the plaintiffs relied upon a contract as fixing the mode of estimating damages or that they sought a return of patented machines to which if there was no license they were entitled. These were incidents. The essen-

tial features were the allegation of an infringement and prayers for an injunction, on account of profits and triple damages—the characteristic form of relief granted by patent law. The damages were grounded on the infringement, and the contract was relied upon only as furnishing the mode in which they should be ascertained."

In the case of *Geneva Furniture Company v. Karpen,* 238 U. S. 254, the Court said at page 258:

"Thus it is within the ruling in *The Fair v. Kohler Die Co.,* 228 U.S. 22, 25, that 'if the plaintiff really makes a substantial claim under an act of Congress there is jurisdiction whether the claim ultimately be held good or bad'. Jurisdiction, as pointed out in that case, is the power to consider and decide one way or the other, as the law may require, and is not to be declined merely because it is not foreseen with certainty that the outcome will help the plaintiff. Of like import is Healy v. Sea Gull Specialty Co., 237 U.S. 479. *"We therefore hold that so much of the bill as charges the defendants with contributory infringement of the plaintiff's letters patent and seeks relief on that ground presents a case arising under the patent laws of which the District Court should have taken jurisdiction."* (Emphasis supplied.)

CONCLUSION.

Petitioner submits that the showing herein made substantiates the jurisdiction and entitles petitioner to

a grant of the writ of certiorari, or at least a hearing on probable jurisdiction often granted by the Court.

Dated, Washington, D. C.,
December 29, 1941.

Respectfully submitted,
CHARLES E. RIORDAN,
Attorney for Petitioner.

BOOTH B. GOODMAN,
Of Counsel.